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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES CHAMP WILLIAMS, STEPHEN S. WILLIAMS, and SUSAN WILLIAMS WOOD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals committed error in applying the harmless error rule under Fed. R. Crim. P. 52(a) to the erroneous admission of evidence which comprised a major portion of the government's evidence in a criminal tax case.

PARTIES BELOW

Petitioners

Susan Williams Wood

Stephen Scott Williams

Charles Champ Williams

Respondent

United States of America

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No.

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OPINIONS BELOW

The decision of the court of appeals is unreported. It appears as Appendix I, pp. A-1 - A-4, *infra.* The denial of the suggestion of rehearing in banc and Petition for Rehearing appears at Appendix II, p. A-5, *infra.*

JURISDICTION

The opinion of the Court of Appeals was filed on February 23, 1989. Appendix I, p. A-1. The petition for rehearing was denied on April 3, 1989. Appendix II, p. A-5. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTE

The following portion of Fed. R. Crim. P. 52 is relevant to this case:

Rule 52 Harmless Error and Plain Error

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

This is an appeal from the convictions of Charles Champ Williams, Stephen S. Williams and Susan Williams Wood on a one-count indictment for conspiracy to defraud the United States by impeding the assessment and collection of income taxes. A fourth defendant, Betty A. Williams, was acquitted after a two month trial and two and one-half days of jury deliberation.

A panel of the Eleventh Circuit affirmed the conviction finding that a substantial portion of the government's evidence had been erroneously admitted, but that its admission was harmless error under Fed. R. Crim. P. 52(a). *See* Appendix I at pp. A-3 -A-4, *infra*. A timely petition for rehearing and suggestion of rehearing in banc was denied by the court. Appendix II at pp. A-5 - A-6, *infra*.

Basically, the Defendants were charged with failing to report all of their revenues from a family-owned food and beverage concession at the Orlando International Airport, or, in other words, with "skimming" revenues. The prosecution's chief witness was R. Bruce Williams, son and brother of Defendants.

The credibility of Bruce Williams was severely damaged by proof at trial that he had perjured himself before the grand jury and at the trial of this case. The proof also demonstrated that Bruce Williams had used his allegations of skimming in an effort to extort money from his family.

In order to provide support for the allegations of Bruce Williams, the prosecution introduced, over timely objection, a great deal of testimony and documentary evidence comparing the cost of food sold at Defendants' restaurant facilities to the cost of food sold at other airport facilities nationwide. The court of appeals found that the trial judge abused his discretion in admitting this evidence.

The court of appeals found, however, that the admission of this evidenee was harmless error pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure. This ruling cannot be reconciled with the record or with prior decisions of this Court and other federal courts interpreting the standard of review under Rule 52(a).

Moreover, the evidentiary issue presented to the Eleventh Circuit raises an important federal question regarding the admissibility of comparison evidence. These questions are important in federal, civil and criminal tax litigation.

REASONS FOR GRANTING THE WRIT

In its per curiam decision affirming the convictions of defendants, the Eleventh Circuit correctly concluded that a major portion of the prosecution's case—the so-called comparison evidence—had been erroneously admitted. Rather than reversing the conviction and remanding for a new trial, however, the Eleventh Circuit concluded that the admission of this evidence was harmless under Fed. R. Crim. P. 52(a).

The panel explained its decision by stating that petitioners "failed to demonstrate that erroneous admission of the evidence was prejudicial to them." Appendix I, p. A-4. Consequently, the panel improperly placed the burden on petitioners to demonstrate that such inherently misleading evidence was not prejudicial. This ruling directly conflicts with this Court's decision in *Bihn v. United States,* 328 U.S. 633, 638 (1946).

Moreover, the application of the harmless error rule to evidence which makes up such a major portion of the government's case is unprecedented. It is wholly contrary to the teachings of this Court in *Kotteakos v. United States,* 328 U.S. 750, 761 (1946), and numerous decisions of the courts of appeals interpreting this standard.

I. THE COURT OF APPEALS' DECISION MISAPPREHENDS AND MISAPPLIES THE HARMLESS ERROR RULE AS SET FORTH IN *KOTTEAKOS v. UNITED STATES* AND FED. R. CRIM. P. 52(a)

In *Kotteakos v. United States,* 328 U.S. 750, 764 (1946), this Court established the prevailing standard for determining whether an error at trial can be considered harmless. That standard is stated as follows:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand . . . .

Kotteakos v. United States, 328 U.S. 750, 761 (1946). In its decision in this case, the Eleventh Circuit cited, but incorrectly stated and applied the standard adopted by *Kotteakos.* The issue, under *Kotteakos,* is whether the error had more than a "slight effect" upon the jury's decision.

The Eleventh Circuit explained its decision by stating that the defendants "failed to demonstrate that erroneous admission of the evidence was prejudicial to them." Appendix I at p. A-4. The court based this conclusion upon the fact that defendants introduced testimony that the cost-of-food sold comparison was inappropriate, and upon counsel's cross-examination of the prosecution's experts regarding the differences between defendants' operations and the operations to which they were being compared. *Id.* at 5-6. The panel's rationale simply does not adhere to the *Kotteakos* standard, and it cannot be squared with the record in this case.

By all accounts, this comparison evidence was a central portion of the government's case. Under the *Kotteakos* standard, erroneously admitted evidence which constitutes such a major portion of the prosecution's case and which would normally be prejudicial should never be considered harmless errror, at least absent some showing by the prosecution that the error was harmless. *See Bihn v. United States,* 328 U.S. 633, 638 (1946). In other words, the burden is on the prosecution, not defendants, to show that such inherent misleading and pervasive evidence was not prejudicial. On appeal in this case, the Government did not even offer to make such a showing.

Thus, the Eleventh Circuit's decision incorrectly formulated and applied the harmless error rule for three reasons:

(1) Once it was shown that the comparison evidence was erroneously admitted, the panel incorrectly placed the burden upon defendants to demonstrate that such inherently prejudicial evidence was not harmless; and

(2) The panel's decision improperly punishes defendants for their counsel's efforts to limit the effect of the comparison evidence.

(3) The panel applied the harmless error rule to evidence which comprised a major portion of the government's case.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURT OF APPEALS

In every reported decision of this Court, and in several decisions of federal circuit courts, the erroneous admission of evidence that was relied upon so pervasively and so frequently during the trial has been found to constitute reversible error. *E.g., Kotteakos, supra,* 328 U.S. at 761; *Bihn, supra,* 328 U.S. at 638; *United States v. Seelig,* 622 F.2d 207 (6th Cir. 1980); *United States v. Gilliam,* 484 F.2d 1093 (D.C. Cir. 1973).

Seelig, supra, cannot be distinguished from this case. Presumably, the panel of the Eleventh Circuit which found that the comparison evidence in this case was erroneously admitted, found *Seelig* persuasive on the issue of whether it was error to admit the comparison evidence.

In *Seelig,* the Sixth Circuit found that the comparison evidence in that case had been admitted erroneously. As in this case, the court found that the prosecution had failed to establish comparability and therefore the comparison evidence was "simply irrelevant." 622 F.2d at 215.

In reversing the case the Sixth Circuit held that "the prosecutor's use of the comparison chart in final argument precludes us from finding its admission harmless error." *Id.* The Court further stated that the admission of the evidence was reversible error because the "exhibit suggested the jury make an inference of guilt that the exhibit did not support." *Id.* at 216.

If the admission of comparison evidence was reversible error in *Seelig,* then surely it must be here. The prosecutor in this case referred to this evidence throughout the trial as well as during closing. Moreover, the comparison evidence in this case was presented in a variety of ways, through testimony, as well as numerous charts and exhibits, not simply in one exhibit as in *Seelig.*

Clearly, then, the Eleventh Circuit's decision conflicts with the decisions of this Court and other courts of appeals in the application and formulation of the harmless error standard established under *Kotteakos* and Fed. R. Crim. P. 52. The issue is whether the error had more than a "slight effect" upon the jury. *Kotteakos, supra,* 328 U.S. at 762. The issue is not, as the panel suggested, whether defendants presented testimony and argument that the jury should not give weight to the evidence. If that were true, erroneously admitted evidence would never constitute reversible error as long as defense counsel are diligent in seeking to limit the prejudicial effect of the evidence.

Error cannot be disregarded on the basis of mere conjecture that the jury did not draw a possible inference unfavorable to the defense. *Stewart v. United States,* 366 U.S. 1, 7 (1961). There is no room for "unguided speculation." *Holloway v. Arkansas,* 435 U.S. 475, 491 (1978). Erroneously admitted evidence which played such a significant role at trial as did the comparison evidence here can never realistically be considered harmless under the standards established by *Kotteakos* and its *progeny.* The panel decision of the Eleventh Circuit affirming the convictions of petitioners directly conflicts with these decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3809

D.C. Docket No. 86-95

United States of America,
Plaintiff-Appellee,

vs.

Charles Champ Williams, Stephen S. Williams,
Susan W. Wood,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(February 23, 1989)

Before ANDERSON and COX, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Appellants Charles Williams, Stephen Williams, and Susan Williams Woods were charged in a one-count indictment with conspiracy to defraud the United States through corporate income tax evasion in violation of 18 U.S.C. § 371 (1966). Upon their convictions after trial by jury, Charles and Stephen Williams were each sentenced to imprisonment for a period of two and one-half years, and fined $10,000; Susan Woods was

sentenced to imprisonment for a period of one year and a day, and fined $10,000. We affirm.

I. Background

The following is a brief summary of the facts which the Government sought to prove at trial:[1] The Williams family-father Charles and mother Betty, and children Bruce, Stephen, and Susan — collectively owned all of the shares of Williams Management Enterprises, Inc. (WME). Through various subsidiary corportions, WME owned the exclusive right to operate food and beverage concessions at the Orlando International Airport and its predecessor, the Orlando Jetport. Bruce and Stephen Williams served as the president and vice-president, respectively, of WME, and Susan Williams Woods served as its secretary-treasurer. When Bruce Williams joined the family business in 1970, he was instructed almost immediately by Champ Williams about how to skim cash receipts from gross receipts of the family concessions businesses at the airport, thereby evading corporate income taxes on the skimmed proceeds. The skimming operation lasted approximately 11 years, and all family members were actively involved in some facet of the skim. The skim involved removal of cash receipts and guest checks from various concessions locations, the manipulation of cash register records to avoid the suspicions of employees, and the manipulation of corporate accounting records to avoid the suspicions of city and airport officials. Initially, skimmed proceeds were left in cash form and buried under the crawlspace of Champ Williams' home. When the cash began to deteriorate, however, the cash was converted to gold Krugerrands which were distributed among family members. Of course, efforts were made by all family members to transact their personal business only in cash. The skimming operation was halted for a

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[1] The evidence, though not particularly complex, was detailed and quite voluminous, and our recitation of it is skeletal. Because of the manner of which we dispose of this appeal, however, a more detailed exposition is unnecessary.

brief period in 1980 in order to improve WME's profit picture for the purpose of obtaining bank financing. When Champ and Bruce ultimately disagreed in 1981 about the wisdom of restarting the skimming operation, Bruce was gradually ostracized from the family business. In 1984, Bruce contacted federal authorities about the skim, and his testimony before a grand jury and at trial was instrumental in obtaining the convictions of the appellants.

II. **Discussion**

Several issues are raised by the appellants, but only one of the issues has sufficient merit to warrant discussion. We will confine ourselves, therefore, to discussion of that issue.

In support of its case against the defendants-appellants, the Government introduced over timely objection testimony and documentary evidence comparing the cost of food sold at the appellants' Orlando airport facilities to the cost of food sold at other airport restaurant facilities nationwide. The evidence was introduced to raise the inference that skimming of gross profits by the appellants produced an artificially high cost-of-food-sold ratio for their business. Appellants objected that the evidence was irrelevant and misleading because the Government did not lay a proper foundation showing that the operations of all of the restaurants were sufficiently comparable to give the evidence probative value. Although we agree that a sufficient foundation of comparability was not laid by the Government, and that, therefore, the evidence should not have been admitted over the appellants' objections, we do not find that admission of the evidence is reversible error.

A trial court's ruling on the admissibility of evidence will not be disturbed in the absence of a clear showing that the ruling was an abuse of discretion. *United States v. Griffin,* 778 F.2d 707, 709 (11th Cir. 1985); *United States v. Williford,* 764 F.2d 1493, 1497 (11th Cir. 1985). Even in those cases in which an abuse of discretion is found, however, reversible error does not

exist if the error was harmless. Fed. R. Crim. P. 52(a). Error is harmless if the reviewing court can say, with fair assurance, considering the record as a whole and including the challenged error, that substantial rights of the accused were not affected. *United States v. Whitaker,* 619 F.2d 1142, 1147 (5th Cir. 1980).

We conclude that it was error to admit the testimony and documentary evidence comparing the cost of food sold at appellants' Orlando facilities with the cost of food sold at the other airport facilities proffered by the Government. The probative value of such evidence depends, in part, upon a showing that the restaurant operations compared were substantially similar in their operations; in the absence of such a showing, the evidence is irrelevant and, therefore, inadmissible. *See* Federal Rule of Evidence 402. A review of the record in this case reveals that no effort was made by the prosecutor to lay a foundation of substantial similarity prior to an objection by the defendants. Even after the objection, the foundation adduced by the prosecutor from the two witnesses who testified on the issue was meager at best, and, in our opinion, insufficient.

We decline to find that the admission of the cost comparison evidence is reversible error, however, because we also conclude that the error did not adversely affect substantial rights of the accused. Testimony of both of the Government witnesses who testified concerning the airport restaurant operations to which the defendants' Orlando operation was being compared quantified and defined the differences between the operations. Furthermore, the appellants called their own expert witness who testified at length about the inappropriateness of comparing cost-of-food-sold statistics where substantial similarity of the operations had not been demonstrated. In view of this testimony, we conclude that the appellants have failed to demonstrate that erroneous admission of the evidence was prejudicial to them.

For the reasons given in this opinion, therefore, the convictions of all appellants are AFFIRMED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3809

United States of America,
Plaintiff-Appellee,

vs.

Charles Champ Williams, Stephen S. Williams,
Susan W. Wood,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion February 23, 1989, 11 Cir., 1989, ____ F.2d _ __).

(April 3, 1989)

Before ANDERSON and COX, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in

banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll of the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge